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Md Nurhidayat bin Md Ali v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–253–10 OF 2012
AZAHAR MOHAMED, MOHTARUDIN BAKI AND HAMID SULTAN JJCA
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Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in 106.1g of mixture of heroin and monoacetylmorphines — Appeal against conviction and sentence — Drugs found in backpack carried by appellant — Whether difference in description of drugs exhibits created doubt in identity of drugs — Whether statement taken under s 112 of the Criminal Procedure Code from person who was with accused admissible under s 32(1)(i) of the Evidence Act 1950 without calling maker — Whether physical control of backpack lead to inference of knowledge of drugs — Whether possession of drugs proven — Whether backpack handed to appellant by third party

Evidence — Documentary evidence — Admissibility of — Statements — Statement recorded under s 112 of the Criminal Procedure Code — Maker of statement could not be located despite reasonable efforts — Whether statement admissible under s 32(1)(i) of the Evidence Act 1950 without calling maker

Based on information received, Inspector Mohamad Nizan ('PW4') and his team had kept surveillance at Perhentian Puduraya where they spotted the appellant together with one Nur Hayati. The appellant was seen wearing a blue backpack. The appellant and Nur Hayati were immediately arrested and PW4 found a mixture of heroin and monoacetylmorphines contained in five transparent plastic packets in the blue backpack. The appellant was charged for trafficking in 106.1g of a mixture of heroin and monoacetylmorphines, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). During the trial, Nur Hayati was not called as a witness but her statement made under s 112 of the Criminal Procedure Code (exh P24) was admitted pursuant to s 32(1)(i) of the Evidence Act 1950 ('the EA'). At the end of the prosecution's case, the learned trial judge ('the judge') found that the appellant had actual possession of the impugned drugs. The judge further invoked the presumption of trafficking under s 37(da)(i) and (ii) of the DDA. The appellant's defence was that he was an innocent carrier of the bag containing the impugned drugs. The appellant claimed that he worked in Penang and that his supervisor by the name of Raju had handed the bag to him with instructions to hand it over to someone called 'Boy' when he arrived at Puduraya. Hence, whilst the appellant did not dispute that he had carried the

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blue backpack, he denied any knowledge about the impugned drugs inside the said backpack. The judge convicted the appellant and sentenced him to the mandatory death penalty. The appellant appealed against the conviction on the grounds that (i) there was serious doubt as to the identity of the drugs exhibits since there were discrepancies between the evidence given by the prosecution witnesses with regard to the description of the impugned drugs tendered in court; (ii) there was no independent evidence to prove actual possession of the drugs by the appellant; (iii) that the judge erred in admitting exh P24 under s 32(1)(i) of the EA on the ground of lackadaisical attitude by the police in procuring Nur Hayati's attendance during the trial; and (iv) the judge had failed to adequately consider the defence.

Held, dismissing the appeal and affirming the conviction and sentence of death:

(1) There was no break in the chain of evidence regarding the exhibits. The difference in the description by PW4 and PW6 of the same drugs exhibits could not be said to have created a doubt on the identity of the drugs in question. The totality of the evidence when taken together irresistibly showed that the drugs tendered in court, which formed the subject matter of the charge were the one actually seized from the appellant (see para 16).

(2) Knowledge, which represents the mental or mens rea element, is one of the prerequisite of possession. As a matter of general principle, physical control of the backpack by the appellant is by itself insufficient to constitute possession of the drugs inside the backpack for there must be the evidence of the appellant's actual knowledge of the impugned drugs (see para 18).

(3) The appellant was in the act of carrying the backpack at the material time. Since the prosecution had proved the fact that the appellant was in physical control of the backpack, there was a strong inference that the appellant knew all along that the bag contained the offending drugs. It called for an explanation by the appellant in order to rebut the said strong inference. On the facts of the present case, the judge was correct in holding that the appellant had the requisite knowledge and therefore was in actual possession of the drugs in question at the material time (see paras 18–20).

(4) The provisions of s 32 of the EA relates to the admissibility of evidence. The condition precedent that the prosecution had to satisfy was either to prove that Nur Hayati could not be found or that her attendance could not be procured without an amount of delay or expense which under the circumstances appeared to be unreasonable. PW7 had explained all the necessary steps and efforts he had undertaken to procure the witness. The

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police had undertaken a diligent search and reasonable exertion was made to procure the witness (see paras 21–23).

(5) There was no merit in the argument that the judge had relied on exh P24 before making a finding that the appellant had possession over the drugs. Even though the judge referred to the statement in her judgment, she however did not place much reliance on it. There were other overwhelming evidence that pointed to the appellant having mens rea possession of the drugs (see para 24).

(6) The appellant's story was incapable of raising a reasonable doubt on the prosecution's case. The appellant had more than enough opportunity to ascertain what was inside the backpack which Raju had handed over to him. He deliberately did not take the trouble to inspect the backpack but merely relied on what was said by Raju. He shut his eyes to the obvious and consciously refrained from inquiry because he knew what was inside the backpack. No one had prevented him from checking it. Hence, the appellant's defence was rightly dismissed by the judge (see para 26).

[Bahasa Malaysia summary

Berdasarkan maklumat yang diterima, Inspektor Mohamad Nizan ('PW4') dan pasukannya telah menjalankan pengawasan di Perhentian Puduraya di mana mereka melihat perayu bersama-sama dengan seorang yang bernama Nur Hayati. Perayu dilihat membawa beg berwarna biru. Perayu dan Nur Hayati kemudiannya ditahan dan PW4 menjumpai campuran heroin dan monoacetylmorphines yang terkandung di dalam lima beg plastik lutsinar dalam beg biru tersebut. Perayu dituduh mengedar 106.1g campuran heroin dan monoacetylmorphines, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya ('ADB'). Semasa perbicaraan, Nur Hayati tidak dipanggil sebagai saksi tetapi kenyataannya yang dibuat di bawah s 112 Kanun Tatacara Jenayah ('eksh P24') diterima di bawah s 32(1)(i) Akta Keterangan 1950 ('AK'). Di akhir kes pendakwaan, hakim bicara memutuskan bahawa perayu mempunyai milikan sebenar dadah tersebut. Hakim seterusnya membangkitkan anggapan pengedaran di bawah s 37(da)(i) dan (ii) ADB. Pembelaan perayu adalah dia adalah pembawa tidak bersalah kepada beg yang mengandungi dadah tersebut. Perayu mendakwa bahawa dia bekerja di Pulau Pinang dan penyelianya yang bernama Raju telah menyerahkan beg tersebut kepadanya dengan arahan agar menyerahkan beg itu kepada seorang yang bernama 'Boy' apabila dia tiba di Puduraya. Oleh itu, walaupun perayu tidak mempertikaikan bahawa dia membawa beg biru tersebut, dia menafikan apa-apa pengetahuan mengenai dadah tersebut di dalam beg. Hakim mensabitkan perayu dan menjatuhkan hukuman mati ke atasnya. Perayu merayu terhadap sabitan atas alasan bahawa (i) terdapat keraguan serius mengenai identiti ekshibit dadah kerana terdapat kepincangan antara keterangan yang diberikan oleh saksi-saksi pendakwaan berkenaan perihal dadah yang dikemukakan dalam mahkamah; (ii) tiada keterangan bebas untuk membuktikan milikan sebenar oleh perayu; (iii)

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bahawa hakim khilaf dalam menerima eksh P24 di bawah s 32(1)(i) AK atas alasan sikap acuh tak acuh pihak polis dalam memastikan kehadiran Nur Hayati ketika perbicaraan; dan (iv) hakim bicara gagal mempertimbangkan pembelaan dengan secukupnya.

Diputuskan, menolak rayuan dan mengekalkan sabitan dan hukuman mati:

(1) Tiada pemutusan dalam rantaian keterangan bagi ekshibit-ekshibit. Perbezaan dalam gambaran oleh PW4 dan PW6 bagi ekshibit-ekshibit dadah yang sama tidak boleh dikatakan membentuk keraguan ke atas identiti dadah yang dipersoalkan. Keseluruhan keterangan apabila dipertimbangkan bersama menunjukkan bahawa dadah yang dikemukakan di mahkamah, yang membentuk hal perkara pertuduhan adalah yang sama dengan yang dirampas daripada perayu (lihat perenggan 16)

(2) Pengetahuan, yang mewakili elemen mental atau mens rea, adalah salah satu prasyarat milikan. Sebagai satu prinsip am, kawalan fizikal ke atas beg oleh perayu secara sendirinya tidak cukup untuk membentuk milikan dadah di dalam beg itu sendiri kerana mesti terdapat keterangan mengenai pengetahuan sebenar dadah tersebut (lihat perenggan 18).

(3) Perayu sedang membawa beg tersebut ketika itu. Oleh kerana pihak pendakwaan telah membuktikan fakta bahawa perayu mempunyai milikan fizikal ke atas beg, tiada kesimpulan yang kuat bahawa perayu mengetahui bahawa beg tersebut mengandungi dadah tersebut. Ini memerlukan penjelasan oleh perayu untuk menyangkal kesimpulan yang kuat. Berdasarkan fakta kes ini, hakim adalah betul dalam memutuskan bahawa perayu mempunyai pengetahuan yang diperlukan dan dengan itu, mempunyai milikan sebenar dadah yang dipersoalkan pada masa material (lihat perenggan 18–20).

(4) Peruntukan-peruntukan s 32 AK adalah berkenaan kebolehterimaan keterangan. Syarat terdahulu yang perlu dipenuhi oleh pihak pendakwaan adalah sama ada membuktikan bahawa Nur Hayati tidak dapat dikesan atau bahawa kehadirannya tidak boleh diperolehi tanpa sedikit kelewatan atau perbelanjaan yang mana hal-hal keadaan kelihatan tidak munasabah. PW7 telah menjelaskan kesemua langkah-langkah dan usaha-usaha yang perlu yang telah diambil untuk mendapatkan saksi-saksi. Pihak polis telah mengambil langkah carian teliti dan langkah munasabah telah dijalankan untuk mendapatkan saksi (lihat perenggan 21–23).

(5) Tiada merit dalam hujahan bahawa hakim telah bersandarkan pada eksh P24 sebelum membuat dapatan bahawa perayu mempunyai milikan ke atas dadah-dadah. Walaupun hakim merujuk kepada pernyataan tersebut di dalam penghakimannya, beliau tidak membuat beberapa

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sandaran padanya. Terdapat banyak lagi keterangan lain yang menunjukkan bahawa perayu mempunyai mens rea milikan ke atas dadah (lihat perenggan 24).

(6) Cerita perayu tidak mampu membangkitkan keraguan munasabah ke atas kes pendakwaan. Perayu mempunyai lebih daripada cukup peluang untuk memastikan apa yang terdapat di dalam beg yang diserahkan oleh Raju kepadanya. Dia sengaja tidak mahu memeriksa beg tersebut tetapi sekadar bergantung pada apa yang dikatakan oleh Raju. Dia menutup mata kepada apa yang zahir dan tidak bertanya kerana dia tahu apa yang terdapat di dalam beg. Tiada siapa yang menghalangnya daripada memeriksa beg itu. Oleh itu, pembelaan perayu ditolak oleh hakim dengan betul (lihat perenggan 26).]

Notes

For cases on admissibility of documentary evidence, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1350–1371.

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 481–669.

Cases referred to

Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 6 AMR 189, CA (refd)

PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (folld)

Sim Tiew Bee v PP [1973] 2 MLJ 200, FC (refd)

Su Ah Ping v PP [1980] 1 MLJ 75, FC (refd)

Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Criminal Procedure Code s 112

Dangerous Drugs Act 1952 ss 37(da)(i), (ii), 39B(1)(a), 39B(2)

Evidence Act 1950 s 32(1), 32(1)(i)

Appeal from: Criminal Trial No 45A-60–10 of 2011 (High Court, Kuala Lumpur)

GK Ganesan (GK Ganesan) for the appellant.

Azlina bt Rasdi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] The appellant was charged and tried for trafficking in 106.1g of a mixture of heroin and monoacetylmorphines before the Kuala Lumpur High Court, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act

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1952 ('the DDA'), and punishable with mandatory death penalty prescribed under s 39B(2) of the DDA. The charge reads:

> Bahawa kamu pada 29 Jun 2011, jam lebih kurang 9.30 malam di kawasan tangga hala keluar dari kawasan Hentian Puduraya, Jalan Pudu, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, telah didapati mengedar dadah berbahaya campuran Heroin dan Monoacetylmorphines seberat 106.1 gram (87.3 gram Heroin dan 18.8 gram Monoacetylmorphines). Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the conclusion of the trial, the learned High Court judge convicted the appellant on the charge and sentenced him to the mandatory death penalty and against that conviction he had appealed to this court.

[3] The facts of the case are well set out in the judgment of the learned High Court judge (see appeal record vol 1, pp 77–81). Here we will only narrate the essential prosecution evidence adduced at the trial. Upon information received, Insp Mohamad Nizan bin Mohamad Nor ('PW4') gathered together a raiding team. He briefed them on the information and organised a raiding plan. After the said briefing, at around 6pm, PW4 and his team proceeded to *Perhentian* Puduraya. At the targeted area, PW4 and his raiding team took position and kept a close surveillance in various locations surrounding the vicinity.

[4] At about 9pm of the same day, the appellant together with one Nur Hayati was spotted. At the material time, the appellant was seen wearing a blue backpack and holding a black bag. Nur Hayati was seen holding a handbag. Both of them were subsequently arrested at the main staircase of *Perhentian* Puduraya. Following a search, PW4 found five transparent plastic packets containing substances suspected to be heroin in the blue backpack.

[5] Apart from the appellant and Nur Hayati, PW4 had also arrested one Mohammad Amirul bin Mohd Nor ('PW6') at the staircase because he was informed that PW6 was Nur Hayati's relative who had come to the *Perhentian* Puduraya to fetch her.

[6] The five transparent plastic packets were subsequently sent to the Chemistry Department for chemical examination and analysis. They were later confirmed by the chemist, Suhana bt Ismail ('PW5') to contain a mixture of heroin and monoacetylmorphines, weighing in total 106.1g. In her evidence, PW5 said the total amount of heroin and monoacetylmorphines was 87.3g and 18.8g respectively.

[7] It has to be noted that during the trial, Nur Hayati was not called as a witness even though, as indicated earlier, she was arrested together with the

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appellant. On the application of the prosecution, the learned High Court judge admitted Nur Hayati's statement made under s 112 of the Criminal Procedure Code (exh P24) pursuant to s 32(1)(i) of the Evidence Act 1950. In exh P24, Nur Hayati stated that she had made arrangements with the appellant also known as 'Yat' (whom she claimed to know for only four days) to go to Kuala Lumpur on 29 June 2011. She asked the appellant to wait for her at the Sg Nibong Bus Station. She claimed that when she arrived there, she saw him waiting for her and carrying a blue bag. She added that the appellant kept the said bag at the luggage compartment under the bus before entering the bus and only took it out after reaching Kuala Lumpur. We will say more about exh P24 later in this judgment.

[8] At the end of the prosecution's case, on the basis of the primary evidence adduced by the prosecution which we have highlighted above, the learned High Court judge made a finding that the appellant had actual possession of the impugned drugs. In the words of the learned High Court judge:

> As to the conduct of the accused at the time of arrest, from the evidence of the arresting officer, PW4, the accused appeared 'slumber' both before and after his arrest. He was not surprised over what the police had recovered from the backpack. This can be compared and contrasted with the reaction of Nur Hayati who appeared surprised with the contents of the backpack. Although the conduct of the accused at the time of his arrest may not amount be conclusive evidence pointing to his knowledge of the contents of the backpack, however, the court finds that in this case, that fact taken together with all the other evidence adduced such as the recovery of the drugs in an unlocked bag, the unsealed plastic bags as well as the clear transparent bags in which the drugs were kept, and the accused having carried it from Penang to Kuala Lumpur, collectively points irresistibly to the accused having knowledge of the drugs. Thus, the court is satisfied that the accused had mens rea possession of the backpack containing the dangerous drugs.

[9] Since the total amount of the impugned drugs was in excess of the statutory amount of 15g, the learned High Court judge invoked the presumption under s 37(da)(i) and (ii) of the DDA. The appellant was presumed to be trafficking in the impugned unless he was able to prove to the contrary on the balance of probabilities. For that reason, the learned High Court judge held that a prima facie case had been made out against the appellant in respect of the offence charged. The learned High Court judge then called upon the appellant to enter his defence.

[10] The appellant elected to give sworn evidence. The appellant was the only witness in his own defence. In essence, the appellant said that he was an innocent carrier of the bag containing the impugned drugs. The appellant in his defence claimed that he worked at an air conditioner service shop in Penang and on 29 June 2011, Nur Hayati whom he claimed to have known for half a year asked him to accompany her to Kuala Lumpur. Later on the same day,

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Raju, his supervisor had handed over to him a bag, which according to him would be claimed by someone called 'Boy' when he arrived at Puduraya. In his testimony, he stated that he 'angkat beg terus masuk di bawah bas' and did not know the content of the bag. During the journey from Penang to Kuala Lumpur, the bus had stopped many times for breaks. He also stated that he had told the police about 'Raju'. He claimed that when he was arrested, the police opened the bag and he saw a newspaper package and when it was opened further, the police found a white plastic bag and said 'ini dadah' to which he said 'Saya tak tahu'. He added that he was afraid and as such he did not say anything to the police.

[11] From the version of the defence, it is apparent that the appellant did not dispute that he had carried the blue backpack. However, it was his testimony that he had no knowledge at all about the impugned drugs inside the said backpack as he was merely carrying it for his supervisor by the name of Raju and that he was to hand it over to 'Boy' in Kuala Lumpur.

[12] At the conclusion of the trial, the learned High Court judge found that the appellant had failed to raise a reasonable doubt on the case of the prosecution and that the appellant had failed to rebut the presumption of trafficking on the balance of probabilities. As indicated earlier, the appellant was convicted of the offence and sentenced accordingly.

[13] Before this court, learned counsel for the appellant had raised four grounds. We shall deal with each of them in turn.

[14] The first relates to the failure by the learned High Court judge to realise that there was serious doubt as to the identity of the drugs exhibits. Learned counsel highlighted to us that there were discrepancies between the evidence given by the prosecution witnesses with regard to the description of the impugned drugs tendered in court. He brought to our attention the following evidence of PW4:

> Hasil pemeriksaan, telah dijumpai 5 peket plastik lutsinar berisi ketulan dan serbuk disyaki Heroin. Warna ketulan ialah *hijau muda*.

Learned counsel then referred to the evidence of PW6:

> Saya ada nampak OKT buka beg. Mula-mula keluarkan buku, ada plastik lutsinar. Ketulan batu *macam warna putih*, bulat-bulat berbiji-biji. (Emphasis added.)

[15] According to learned counsel, the difference in the description of the impugned drugs was a material discrepancy; therefore it had created doubt as to the identity of drugs exhibits and for that reason it could not be said that the prosecution had proved its case beyond reasonable doubt.

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[16] We found that the complaint of learned counsel lacked merit. In our view, the complaint by learned counsel for the appellant here really turns upon a question based upon finding of facts by the learned High Court judge. We have read with care the entire evidence as contained in the appeal records. We have no doubt at all that the drugs tendered in court which form the subject matter of the charge was the one actually seized from the appellant. PW4 confirmed and identified in court the drugs which were seized from the appellant's possession. PW4 handed over the same exhibits to the investigating officer, Insp Kumbat ak Tan ('PW7'). PW7 testified that he had kept the exhibits safely in his locked steel cabinet in his room. The exhibits were taken out on the following occasions (i) on 30 June 2011 at 3.30pm for D/Kpl Ahmad Zafri, the police photographer, to take photographs of the exhibits. This was done in PW7's room itself and in the presence of PW7; (ii) on 1 July 2011 at 2.30pm when the exhibits were brought to D/Sjn Jalil for the purpose of fingerprint dusting. PW7 was present during the fingerprint dusting and the exhibits were still under his control. The exhibits were returned to him at 3pm that same day; and (iii) on 4 July 2011 at 8.30am when the exhibits were sent to the Chemistry Department and handed over to the chemist, PW5 for the purpose of analysis. He collected back the exhibits on 11 October 2011 at 11am. On 11 October 2011 at 1.20am, he handed over the exhibits to the store keeper, D/Kpl Mohd Fandi bin Nordin, at Jabatan Siasatan Jenayah Narkotik, Kuala Lumpur. The evidence of PW4 had clearly established that the drugs which PW7 handed to her for analysis were the very drugs she wrapped up after analysis, and then returned them to PW7. He also identified the exhibits in court. The chain of evidence is more important for the period from the time the drugs were recovered until completion of analysis by the chemist (see *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 6 AMR 189). What is more, it is not required that each and every officer who handled the exhibits be called by the prosecution (see *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75). Clearly, there was no break in the chain of evidence regarding the exhibits in the present case. In our view, the court must exercise a certain measure of caution and prudence not to accept and believe any possible doubt raised.

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[17] Based on the actual matrix of the present case, the difference in the description by PW4 and PW6 of the same drugs exhibits could not be said to have created a doubt on the identity of the drugs in question. In our judgment, the totality of the evidence when taken together irresistibly point to this: the drugs tendered in court, which form the subject matter of the charge were the one actually seized from the appellant.

[18] We turn next to the second ground raised by learned counsel for the appellant. It was argued that the learned High Court judge failed to consider that there was no independent evidence to prove actual possession of the drugs by the appellant. In this regard, we agreed with the submission of learned counsel that knowledge, which represents the mental or mens rea element, is one of the prerequisite of possession. As a matter of general principle, physical control of the backpack by the appellant is by itself insufficient to constitute possession of the drugs inside the backpack for there must be the evidence of the appellant's actual knowledge of the impugned drugs. Now, it is not in dispute that the appellant was in the act of carrying the backpack at the material time. In our judgment, since the prosecution had proved the fact that the appellant was in physical control of the backpack, there is a strong inference that the appellant knew all along that the bag contained the offending drugs. It calls for an explanation by the appellant in order to rebut the said strong inference. Support for this proposition can be found from the speech of Lord Wilberforce in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356:

> In all such cases, the starting point will be that the accused had physical control of something — a package, a bottle, a container — found to contain the substance. This is evidence — generally strong evidence — or possession. It calls for an explanation: the explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make the statutory possession.

[19] Our Federal Court also adopted the point made by Lord Wilberforce. In *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1, in delivering the judgment of the Federal Court, Arifin Zakaria FCJ (as His Lordship then was) agreed with the following speech of Lord Morris in *Warner v Metropolitan Police Commissioner*:

> If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or

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container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled of the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[20] Applying the principles as laid down in the case of *Public Prosecutor v Abdul Rahman bin Akif*, in our view, on the facts of the present case, the learned High Court judge was entitled and correct in holding that the appellant had the requisite knowledge and therefore was in actual possession of the drugs in question at the material time.

[21] This brings us to the third ground raised by learned counsel. It will be recalled that the statement of Nur Hayati, which is exh P24 was admitted by the learned High Court judge. Learned counsel submitted that the learned High Court judge erred in admitting exh P24 under s 32(1)(i) of the Evidence Act 1950 ('the EA') on the ground of lackadaisical attitude by the police in procuring Nur Hayati's attendance during the trial. It was argued that the efforts taken by the police to trace Nur Hayati's attendance was very minimal and insufficient to fulfill the threshold requirement of s 32(1) of the EA. The provisions of s 32 of the EA relates to the admissibility of evidence. As an evidentiary provision and as an important hearsay exception, the condition precedent that the prosecution ought to satisfy in the present case was either to prove that Nur Hayati could not be found or that her attendance could not be procured without an amount of delay or expense which under the circumstances appears to be unreasonable (see *Sim Tiew Bee v Public Prosecutor* [1973] 2 MLJ 200).

[22] In the present case, PW7 had explained all the necessary steps and efforts he had undertaken to procure the witness as can be seen in the judgment of the learned High Court judge at pp 75–77 of the appeal record vol 1. In relation to this, the learned High Court judge, after carefully reviewing the evidence, made specific findings concerning this issue as follows:

In respect of the prosecution's application to admit into evidence Nur Hayati's s 112 statement, the court was satisfied that the police had indeed taken all reasonable steps to procure the attendance of Nur Hayati in court as a witness. This can clearly be seen in the various actions taken by PW7 in para 21(i)–(xi). He had travelled from Kuala Lumpur to Mentari Court in Sunway to Ipoh, Perak and then to Penang in his various efforts to locate Nur Hayati and to serve her with a subpoena to attend court. He had spoken to Nur Hayati's uncle in Ipoh and her mother in Penang and had even met with the *pengetua* of Nur Hayati's sister to ascertain where the family was living. From the evidence of PW7, it would be apparent that Nur Hayati was deliberately evading service to avoid having to come forward as a witness. The court

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notes that if a person deliberately strives so as not to be found, it would indeed be very difficult to trace her thus resulting in a game of 'cat and mouse' as can be seen from PW 7's account of his efforts.

In light of the foregoing, the court was satisfied that the statement of Nur Hayati was a statement which fell within the provisions of s 32(1)(i) of the Evidence Act 1950 and the court thus allowed it to be tendered in evidence before the court.

[23] In our judgment, the above finding was correctly made upon a consideration of the circumstances and the factual matrix of the case. The police had undertaken a diligent search and reasonable exertion was made to procure the witness.

[24] On learned counsel's argument that the learned High Court judge had relied on exh P24 before making a finding that the appellant had possession over the drugs, we found no merit in this argument. In the first place, it has to be noted that the statement in exh P24 was made out of court which cannot be the subject to cross-examination in court. Hence there are serious misgivings on the credit worthiness of the statement. In the present case we noted that exh P24 was not the foundation of the prosecution's case. Even though the learned High Court judge referred to the statement in her judgment, she however did not place much reliance on it. There were other overwhelming evidence that pointed to the appellant having mens rea possession of the drugs as can be seen in the following excerpt of the judgment of the learned High Court judge:

> In this case, the evidence adduced was straightforward. Evidence was led from the investigating officer that from the CCTV recording, the accused was seen wearing the blue backpack in the bus parking bay area from the moment his image first appeared. And thereafter, as the court had seen from the CCTV recordings, the accused was seen wearing the blue backpack and walking down the aisle of the *Perhentian* Puduraya waiting area. When the arresting officer, Inspector Nizan (PW4), first saw the accused coming down the stairs from *Perhentian* Puduraya, the accused was still wearing the blue backpack. There is also the independent evidence of Amirul (PW6) that when he first saw the accused, he was wearing the blue backpack. As such, at all material times, no one other than the accused was seen holding or wearing the blue backpack.

[25] Finally, we now turn to consider the appellant's contention that the learned High Court judge erred in failing to adequately consider his defence that he had no knowledge at all about the impugned drugs inside the said backpack. Whether a defence of this nature will succeed or not would very much depend on the facts of each case. The most important question which we must ask here is whether there was sufficient judicial appreciation by the learned High Court judge of the appellant's defence as we have narrated earlier. The determination of this issue requires a scrutiny of the judgment of the learned High Court judge. A close reading of the judgment showed that the

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learned High Court judge took special and particular care to consider and judicially appreciated it at some length before coming to a definite finding of fact on the very essence of the appellant's defence. This is what the learned High Court judge said on this issue:

> The court is satisfied that the accused had knowledge of the contents of the bag. The bag was unlocked, the grey plastic bag inside was only folded down and the black plastic bag loosely tied. The contents of the five transparent plastic bags were clearly visible. The court finds that the accused could have examined the bag and its contents at any time. This fact and the suspicious nature of the accused's story about 'Raju' and 'Boy' all points irresistibly to the fact that the accused had custody, care and control and knew that nature of the drugs, and that he was in possession of the drugs.
>
> Looking at all the evidence adduced, the court is convinced that the accused's defence is but a mere afterthought, a total fabrication and untrue. Nevertheless, the court has duly considered the evidence of the accused and his defence to see whether the defence as such has cast a reasonable doubt as to the truth of the prosecution case. On this issue and based on the reasons aforementioned, the court finds that the defence has not cast a reasonable doubt or any doubt at all as to the truth of the prosecution's case.

[26] We find ourselves in full agreement with the findings of the learned High Court judge. In our judgment, the learned High Court judge directed herself correctly upon this aspect of law and facts. Her findings of fact do not contain any error warranting appellate intervention. In our judgment the appellant's story was incapable of raising a reasonable doubt on the prosecution's case. The appellant had more than enough opportunity to ascertain what was inside the backpack which Raju had handed over to him. He deliberately did not take the trouble to inspect the backpack but merely relied on what was said by Raju. In our view, he shut his eyes to the obvious and consciously refrained from inquiry because he knew what was inside the backpack. No one had prevented him from checking it. In our judgment, the appellant's defence was rightly dismissed by the learned High Court judge.

[27] For all these reasons, we had dismissed the appeal. The learned High Court judge did not make any appealable error which merited our intervention. We found the conviction of the appellant safe. We affirmed the conviction and the sentence of death imposed by the learned High Court judge upon the appellant.

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A *Appeal dismissed and conviction and sentence affirmed.*

Reported by Kanesh Sundrum

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